No. 309

In the Supreme Court of the United States

OCTOBER TERM, 1939

WILLIAM H. DANFORTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The oral opinion of the district court (R. 39–41) is not reported. The two opinions of the circuit court of appeals (R. 221–229; 233–239) are reported in 102 F. 2d 5 and 105 F. 2d 318.

JURISDICTION

The judgment of the circuit court of appeals was entered July 11, 1939 (R. 239–240). Petition for a writ of certiorari was filed August 23, 1939, and was granted on October 9, 1939. The jurisdiction of this Court rests upon section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, in a suit brought by the United States to condemn a flowage easement, the condemnee may, in the absence of statutory consent, recover upon a contract which it is claimed fixed the value of the easement.

2. Whether there has yet been a taking by the Government of a flowage easement over petitioner's property, with a consequent obligation to pay interest from the date of the taking on the sum determined to be the value of the easement.

STATUTES INVOLVED

The pertinent provisions of the Act of March 3, 1797, c. 20, 1 Stat. 514, R. S. sec. 951, 28 U. S. C. sec. 774, and of the Flood Control Act of May 15, 1928, c. 569, 45 Stat. 534, 33 U. S. C. secs. 702a–702m, are set out in the Appendix *infra*, pp. 44–48.

STATEMENT

1. *The proceedings and the contract.*—Acting pursuant to section 4 of the Flood Control Act of May 15, 1928, *infra*, p. 47, the Secretary of War authorized the making of offers for the acquisition of flowage rights in the Birds Point-New Madrid Floodway (R. 69). On January 14, 1932, the District Engineer addressed a letter to the petitioner, the pertinent parts of which are as follows (R. 69):

> I am * * * directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and

98/100 Dollars ($31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses. * * *

This offer was accepted by the petitioner (R. 69) prior to its expiration (R. 171). Shortly thereafter the War Department ascertained that a number of its offers were excessive, and the Secretary of War directed the withdrawal of 138 such offers, including this and 24 others which had been accepted (R. 137–155). On July 8, 1932, the District Engineer wrote to the petitioner (R. 185–186), saying:

It is regretted that after a careful review of the question of flowage over these tracts it was found that the prices first suggested could not be properly recommended to the Court. It is not feasible for this office to recommend for an agreed verdict prices in excess of what are considered fair and reasonable prices by higher authority. As all flowage cases are to be presented to the Court, this office is confident that just compensation will be awarded in all cases.

On September 25, 1933, the Government instituted this condemnation proceeding in the United States District Court for the Eastern District of Missouri (R. 2–10). Pursuant to section 4 of the Act of May 15, 1928, *infra*, p. 47, the court appointed commissioners to appraise the value of the flowage easements (R. 11–15). The commissioners reported an award of $20,409.90 (R. 15–16). Both parties filed exceptions (R. 16–20).

Petitioner then filed an answer and a counterclaim asking the court for judgment against the United States in the sum of $31,681.98 with interest (R. 21–25). On motion of the Government (R. 27–32) the answer and counterclaim were stricken (R. 39–41).

The Government's exceptions to the award were sustained (R. 51) because the amount was too high (R. 217) and new commissioners were appointed (R. 53–54). They reported a value of $8,428.25 (R. 54–56) which, on the exceptions of petitioner (R. 57–61), was set aside because inadequate (R. 61) and new commissioners were appointed (R. 62–63). These commissioners returned an award fixing just compensation at $17,921.70 (R. 63–64). Exceptions of both parties (R. 65–72) were overruled (R. 73–79) and on April 23, 1937, the district court entered judgment that the United States will acquire the flowage easement prayed for in the petition when it pays that amount into the registry of the court (R. 78–79). Motions for new trial by

both parties (R. 80–89) were overruled (R. 92) and petitioner appealed (R. 92–101).

2. *The date of taking, if any, of a flowage easement.*—The Flood Control Act adopted by reference the Jadwin plan for flood control in the Mississippi valley, H. Doc. No. 90, 70th Cong., 1st sess. (1927). That plan recommended (pars. 13, 124–126) the construction of floodways in several of the basins of the Mississippi valley to relieve the main stem of the river of its excess floodwaters. One of these floodways was to be along the west side of the Mississippi River between Birds Point and New Madrid, Missouri.[1] This was to be accomplished by constructing between those points a second or set-back levee several miles west of the existing riverside levee and by reducing the height of an eleven-mile portion of the riverside levee south of Birds Point from a grade equivalent to about 58 feet on the Cairo gauge to one equivalent to 55 feet on that gauge. This reduced portion was to be known as the upper fuse-plug section. Provision was also made for a lower fuse-plug section in the portion of the riverside levee near New Madrid.

[1] A map of this floodway and the land involved in the present proceeding is attached to the inside back cover of this brief.

The flood-control work for the Mississippi valley as a whole is discussed in considerable detail in the supplemental brief for the petitioner in *United States* v. *Sponenbarger*, No. 72, this Term.

When the floodway is completed and the riverside levee is reduced the upper fuse-plug section will admit water from the Mississippi River when the flood stage exceeds 55 feet on the Cairo gauge. The set-back levee will confine this diverted water to the floodway territory and will direct it to the south, where it will return to the Mississippi at the lower fuse-plug section, where there is a gap in the levee system to permit complete drainage (R. 109–112). Petitioner's land (Tract No. 243) is situated in the floodway immediately east of the set-back levee,[2] approximately halfway between Birds Point and New Madrid (R. 7).

Construction work on the set-back levee began on October 21, 1929, and was complete on October 31, 1932, except that a gap where the Missouri Pacific Railroad crossed the levee had not been closed.[3] The riverside levee has been maintained at its original height of about 58 feet, and the upper fuse-plug, which is designed to admit water into the floodway, has not yet been created since the necessary flowage easements have not been acquired (R. 111).

In January 1937 the Mississippi River in this stretch attained its highest flood stage in recorded

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[2] No part of the set-back levee has been or is to be built on the land involved in this proceeding. Certain lands of petitioner on which the set-back levee was built were condemned in a separate proceeding (Pet. Br. 5, Pet. 34–41).

[3] This gap was still open at the time of the trial (R. 195–196), but has since been closed.

history (R. 191). On January 24 Colonel Reybold, the officer in charge of Memphis Engineers District No. 1, directed Major Burdick to proceed to the area and place the Birds Point-New Madrid Floodway in operation (R. 196–197, 199). These instructions were issued by Colonel Reybold without orders from any of his superiors (R. 200).

On the morning of January 25 the pressure of the floodwaters opened Natural Crevasse No. 1 in the riverside levee below the upper fuse-plug section, seven miles due east of petitioner's land (R. 192, 193). Water was trickling over the levee when, before noon of the same day, Major Burdick created Artificial Crevasse No. 1 by twice dynamiting the northern portion of the upper fuse-plug section in the vicinity of levee milepost 34 (R. 201–202), fifteen miles northeast of petitioner's land (R. 192). In the late afternoon of that day Artificial Crevasse No. 2 was created near levee milepost 38 (R. 201–202), approximately in the middle of the upper fuse-plug section and about 10 miles from petitioner's land (see map). The next morning, January 26, Natural Crevasse No. 2 developed in the riverside levee less than a mile south of Natural Crevasse No. 1. That afternoon Natural Crevasse No. 3 went into operation.[4]

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[4] At approximately the same time additional dynamiting resulted in Artificial Crevasse No. 3 in the southern portion of the upper fuse-plug section. The record in the case at bar is incomplete and does not reveal this fact. See *Matthews* v. *United States*, 87 C. Cls. 662, 701 (1938).

On January 30 or 31, Natural Crevasse No. 4 was cut through by wave action on the inside of the floodway and then admitted water from the river (R. 192).

The petitioner's property was separated from all of the artificial crevasses by a large natural ridge (O'Bryan's Ridge) and by the embankment of the Missouri Pacific Railroad running between Crosno and the opening in the levee near Samos (R. 192). Both of these had a retarding influence on the flow of the water from the artificial crevasses in the initial stages (R. 192). A witness for petitioner testified that the flow from each of the first two natural crevasses was greater and heavier than the flow from Artificial Crevasse No. 1 and that the water from Natural Crevasse No. 1 probably reached the petitioner's land before the water from the artificial crevasse because the southward flow from the latter would have been arrested until the water filled the basin created by O'Bryan's Ridge and the railroad embankment (R. 193).[8]

The flooding of petitioner's land during the 1937 flood, like that of all other land in the vicinity, would have occurred regardless of the floodway project and even if the levee had not been artificially crevassed (R. 191). The waters, if confined (that is, if there had been neither natural nor arti-

[8] Compare the *Matthews* case (87 C. Cls. 662, 701) where the court found that at 3:55 p. m., January 26, the water from the artificial crevasses had reached the railroad enbankment and had *not* passed over it to the south.

ficial crevassing), would have reached a stage of 61½ or 62 feet on the Cairo gauge and would have overtopped the riverside levee even with extraordinary high-water maintenance (R. 190, 191). The set-back levee in no way contributed to the occurrence of the flood; its sole effect was to confine to the floodway those waters which would have otherwise passed to the west (R. 190, 191). The petitioner's witness estimated that this confinement increased the depth of the water by about five to six feet and would result in increased damage to buildings (R. 190, 191). There is no evidence in the record to show that this estimated increase in depth during the 1937 flood did actually cause any damage to petitioner's property which would not otherwise have occurred.

After the flood subsided, orders were given to restore the riverside levee, including the upper fuse-plug section, to its previous height (R. 200), and this work has been completed.

3. *Action of the circuit court of appeals.*—The circuit court of appeals in its first opinion (R. 221–229) upheld the district court in denying petitioner recovery on the contract, but held that a taking had occurred on October 21, 1929, when construction work on the set-back levee was begun, and modified the judgment so as to include interest on the award from that date. The Government obtained a rehearing (R. 230–233) and, in its second opinion (R. 233–239), the court held that there has

as yet been no taking of a flowage easement over petitioner's land. Accordingly, the judgment of the district court was affirmed without modification (R. 239–240).

SUMMARY OF ARGUMENT

I

In the present condemnation proceeding the petitioner, in a pleading denominated an answer and counterclaim, attempted to bring suit against the United States upon a contract and recover a judgment in the sum of $31,681.98 and interest. *Wachovia Bank & Trust Co.* v. *United States,* 98 F. 2d 609 (C. C. A. 4), was correctly decided but has no bearing on the jurisdictional question here presented. It is a rudimentary principle that the United States cannot be sued without its consent, either by direct suit or by counterclaim.

A. Where the United States institutes a condemnation suit the condemnee may not litigate therein causes of action against the United States unless permitted by statute. Neither the Flood Control Act, pursuant to which this proceeding was brought, nor any other statute confers jurisdiction on the district court to adjudicate petitioner's contract claim. Petitioner's claim for $31,681.98 exceeds the jurisdictional limitation of $10,000 imposed on the district courts by the Tucker Act, even if the Tucker Act permits any recovery of demands upon counterclaims.

B. Petitioner relies upon a line of admiralty cases culminating in *United States* v. *The Thekla*, 266 U. S. 328, 339–340, which held that a plaintiff sovereign so far takes the position of a private suitor as to become subject to an affirmative judgment. The doctrine of the admiralty cases has never been applied outside of that field except to permit recoupment or set-off not exceeding the amount of the Government's claim. These cases do not help petitioner because no claim is asserted to which recoupment or set-off could apply. Furthermore, this being a condemnation proceeding, the very foundation upon which the admiralty doctrine rests is lacking because the United States enters court as a sovereign (*Kohl* v. *United States*, 91 U. S. 367, 371, 372) and not as a private suitor asserting a claim.

C. Even if the district court had jurisdiction to adjudicate petitioner's contract claim he would not be entitled to recover interest because the contract did not provide for interest. *Smyth* v. *United States*, 302 U. S. 329, 353; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 304.

II

The courts below correctly held that there has as yet been no taking of a flowage easement over petitioner's property and that he is therefore entitled to no interest on the award.

A. There was no taking on October 21, 1929, when the Government began work on the set-back

levee. Nothing had been done at that time to increase the possibility that petitioner's land might be overflowed since the riverside levee was maintained at its original height nd the upper fuse-plug section which was designed to divert water to the floodway had not been created. Under the mandate of section 1 of the Flood Control Act the riverside levee could not have been reduced at that time because the floodway was not completed.

Petitioner has not been deprived of his right to raise and improve the riverside levee. Title to the riverside levee still remains in the local levee district and the Flood Control Act does not provide for control by the United States, at least prior to acquisition of the flowage rights. Furthermore, even if it could be said that the Government has deprived the petitioner of his right to improve and raise the levee, this would impose no liability on the Government. *Matthews* v. *United States,* 87 C. Cls. 662, 718 (1938); cf. *Jackson* v. *United States,* 230 U. S. 1; *Hughes* v. *United States,* 230 U. S. 24.

B. There was no taking on October 31, 1932, when work on the set-back levee was 98.9% complete. The riverside levee was still unaltered. Section 1 of the Flood Control Act still prevented the reduction of the riverside levee because the acquisition of flowage easements required for this floodway by section 4 had not been completed.

No taking can be predicted upon the fact that in 1932 the completed portion of the set-back levee would confine to the floodway waters which might

have overtopped the unreduced riverside levee. Section 4 of the Act did not contemplate payment for the confining effect of the set-back levee upon waters which might overtop the riverside levee since that would constitute only consequential damage and not "additional destructive waters that will pass by reason of diversions from the main channel of the Mississippi River." *Matthews* v. *United States*, 87 C. Cls. 662, 719 (1938); see *Sanguinetti* v. *United States*, 264 U. S. 146.

C. In January 1937 the Mississippi River in this stretch attained its highest flood stage in recorded history. The pressure of the water opened natural crevasses in the riverside levee and thereafter officers of the United States Army artificially crevassed the upper fuse-plug section. This action, however necessary as a practical matter, was unauthorized and contrary to the mandate of section 1 of the Flood Control Act. No taking can be predicated upon these unauthorized acts. *Hooe* v. *United States*, 218 U. S. 322; *Hughes* v. *United States*, 230 U. S. 24. After the flood subsided the dynamited portions of the levee were restored to their previous height. It is clear that petitioner's land would have been flooded in 1937 regardless of the floodway project and even if the levee had not been artificially crevassed.

D. No taking had occurred prior to the entry of judgment. The entry of judgment did not constitute a taking, *Barnidge* v. *United States*, 101 F.

2d 295, 298 (C. C. A. 8), and, since the fuse-plug section cannot be reduced until the necessary flowage easements are acquired, no taking will occur until the judgment is paid.

ARGUMENT

I

THE DISTRICT COURT DID NOT HAVE JURISDICTION TO ADJUDICATE PETITIONER'S CONTRACT CLAIM

In the present case the petitioner, in a pleading denominated an answer and counterclaim, attempted to bring suit against the United States upon a contract, asking for judgment against the United States in the sum of $31,681.98 and interest (R. 21–25). Similar relief had been sought by way of exceptions to the Commissioners' award (R. 19, 33–35). After the pleading was stricken out on motion of the United States (R. 39), the petitioner repeatedly asked for this same relief (R. 41–46, 56, 57–61, 68–72, 84–89, 113). The bulk of the testimony offered by petitioner at the trial was directed to proving that the Government had entered into and had breached a binding contract to purchase the flowage rights for $31,681.98 (R. 113–186).

In *Wachovia Bank & Trust Co.* v. *United States*, 98 F. 2d 609, upon which petitioner rests his claim (Br. 44–46), the Circuit Court of Appeals for the Fourth Circuit held that the contract price fixed for land to be acquired by condemnation was bind-

ing on the parties to the contract when the contract was set up by the United States in the condemnation proceedings. The Government does not in any way attack the validity of that decision, which it believes to be entirely correct. But the instant case presents the converse of the *Wachovia* case, for here the United States has disaffirmed the contract and the petitioner is seeking to enforce it in the district court.

It is conceded (Br. 49) that if no condemnation proceedings had been instituted petitioner's only remedy would be in the Court of Claims. But, petitioner urges, the institution by the United States of this condemnation proceeding so enlarged the jurisdiction of the district court as to enable it at the petitioner's instance to enforce the contract against the United States. The relevance of the contract, or the evidentiary weight to be given it, as a measure of the value of the easement is not in issue; the petitioner pitches his case solely on the proposition that he can enforce the contract (Pet. 8–9, 12–13; Br. 12, 41–50).

It is a rudimentary principle that the United States cannot be sued without its consent, either by direct suit or by counterclaim against it. *Nassau Smelting Works* v. *United States*, 266, U. S. 101, 106; *Illinois Cent. R. R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493, 504–505; *North Dakota-Montana W. G. Ass'n* v. *United States*, 66 F. 2d 573, 577–578 (C. C. A. 8), certiorari denied, 291

U. S. 672; *Owen* v. *United States*, 8 F. 2d 992, 993 (C. C. A. 5). We shall show that no such consent has been given.

A. NO STATUTE CONFERS JURISDICTION

1. Where the United States institutes condemnation proceedings, the condemnee may not litigate therein causes of action against the United States unless the statute in question permits him to do so. *United States* v. *Shingle*, 91 F. 2d 85, 89 (C. C. A. 9), certiorari denied, 302 U. S. 746; *United States* v. *John Ii Estate*, 91 F. 2d 93, 94 (C. C. A. 9), certiorari denied, 302 U. S. 746; 2 *Nichols*, Eminent Domain (2d ed.) sec. 425, p. 1121. There is no claim that the Flood Control Act of May 15, 1928, *infra*, pp. 44–48, confers any jurisdiction upon the district court to entertain a counterclaim against the United States.

2. The Tucker Act, Judicial Code, sec. 24 (20), 28 U. S. C. sec. 41 (20), does not confer jurisdiction to adjudicate petitioner's counterclaim in this proceeding, for it limits the jurisdiction of the district courts to claims less than $10,000 in amount.[6] *North Dakota-Montana W. G. Ass'n* v. *United States*, 66 F. 2d 573, 577–578 (C. C. A. 8), certiorari denied, 291 U. S. 672; *Owen* v. *United*

[6] Compare *United States* v. *Nipissing Mines Co.*, 206 Fed. 431 (C. C. A. 2), certiorari dismissed, 234 U. S. 765, in which the Circuit Court of Appeals reversed an affirmative judgment against the United States on the ground that the Tucker Act does not permit recovery of demands upon counterclaims but refers only to original suits.

States, 8 F. 2d 992 (C. C. A. 5). In the latter case, a condemnation proceeding, it was held (p. 993):

> What is undertaken by the landowners here is to collect damages by cross-action. But, without its consent, the government cannot be sued, nor can judgment be rendered against it, even though it is indebted on striking a balance of demands. *De Groot* v. *United States*, 5 Wall. 419, 431, 18 L. Ed. 700. Such consent is not given by Judicial Code, sec. 24, par. 20 (Comp. St. sec. 991), which confers upon District Courts of the United States jurisdiction of claims not exceeding $10,000, because the claim here asserted is for $20,000, and could be asserted, if at all, only in the Court of Claims.

Since the petitioner's claim is for $31,681.98 it is clear that the Tucker Act does not confer jurisdiction upon the district court.

3. Rule 13 of the Federal Rules of Civil Procedure provides a liberal counterclaim practice but expressly provides, in subdivision (a) that "these rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States." See, also, Rule 81 (a) (7).

B. JURISDICTION CANNOT REST UPON THE STATUS OF THE UNITED STATES AS PLAINTIFF

United States v. *The Thekla*, 266 U. S. 328, and the line of admiralty decisions culminating in that

case, upon which petitioner relies (Br. 41–42, 43), are not in point. *The Thekla* involved a collision between a vessel under charter to the United States and the Norwegian barque *Thekla*. The owners of the former libelled the *Thekla* and her owners filed a cross libel. The United States on its own motion became a party libellant and stood on the owner's libel. The libel and cross libel were consolidated and proceeded as one cause of which the subject matter was held to be the collision. The trial court found that the Government's vessel alone was at fault and a decree for damages, interest, and costs was entered against the United States. This Court affirmed. It said (pp. 339–340):

> When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter.

But it is to be noted that the Court expressly stated (p. 339) that it did not "in any way" qualify its decision in *Nassau Smelting Works* v. *United States*, 266 U. S. 101, decided only two weeks before, in which it was held (p. 106):

> The objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a

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[1] *The Nuestra Senora de Regla*, 108 U. S. 92; *The Paquete Habana*, 189 U. S. 453; *The Gloria*, 286 Fed. 188 (S. D. N. Y.); *The Barbara Cates*, 17 F. Supp. 241 (E. D. Pa.).

> counterclaim. Jurisdiction in either case does not exist unless there is specific congressional authority for it. * * *

Only in admiralty, where the courts are constantly confronted with the necessity of determining in one action intricate problems of liability in prize and collision cases, has the doctrine of *The Thekla* been given the scope of permitting the recovery of an affirmative judgment against the United States. Outside of that field it has consistently been held that an affirmative judgment may not be recovered against a sovereign. *In re Patterson-MacDonald Shipbuilding Co.*, 293 Fed. 192 (C. C. A. 9), certiorari denied, 264 U. S. 582; *Roumania* v. *Guaranty Trust Co.*, 250 Fed. 341 (C. C. A. 2), certiorari denied, 246 U. S. 663; *French Republic* v. *Inland Nav. Co.*, 263 Fed. 410 (E. D. Mo.); see *Reeside* v. *Walker*, 11 How. 272, 290–291.

Petitioner relies (Br. 42, 43–44) upon *Bull* v. *United States*, 295 U. S. 247; *United States* v. *Stephanidis*, 41 F. 2d 958 (E. D. N. Y.), affirmed on another ground, 47 F. 2d 554 (C. C. A. 2); *United States* v. *National City Bank*, 83 F. 2d 236 (C. C. A. 2). These cases, although there is rather broader language in the *National City Bank* case, are simply further illustration of the fact that outside of admiralty the doctrine has been limited to allowing recoupments and set-offs not exceeding the Government's claim. Here the United States

is making no claim against the petitioner which could be reduced by a recoupment or set-off.

Petitioner also cites (Br. 42) *United States* v. *Wilkins*, 6 Wheat. 135; *Gratiot* v. *United States*, 15 Pet. 336; *United States* v. *Bank of Metropolis*, 15 Pet. 377. All three of these cases involved set-offs which were authorized by the Act of March 3, 1797, *infra*, p. 44. This statute is not applicable to petitioner's claim since it has not been presented to the General Accounting Office as the Act requires and because in this proceeding the United States makes no demand against petitioner to which a credit or set-off could apply. In any event, none of the cases cited allowed an affirmative judgment against the United States and it is settled that the statute does not authorize such a judgment. *De Groot* v. *United States*, 5 Wall. 419, 431; *United States* v. *Eckford*, 6 Wall. 484; *Schaumberg* v. *United States*, 103 U. S. 667; *In re Clayton Magazines, Inc.*, 77 F. 2d 852, 854 (C. C. A. 2); *United States* v. *Nipissing Mines Co.*, 206 Fed. 431 (C. C. A. 2), certiorari dismissed, 234 U. S. 765; see *United States* v. *Skinner & Eddy Corporation*, 35 F. 2d 889, 898–901 (C. C. A. 9), certiorari dismissed, 281 U. S. 770.

In short, the doctrine of the admiralty cases which permits an affirmative judgment against the United States when it enters court as a private suitor to assert a claim has never been applied outside of that field except to permit recoupment or set-off not exceeding the amount of the Govern-

ment's claim. These cases, which represent the farthest extension of the admiralty doctrine, do not help petitioner because no claim is asserted to which recoupment or set-off could apply.

Finally, in the case at bar the United States did not, as in *The Thekla,* come into court "to assert a claim," and did not take "the position of a private suitor." It came into court as a sovereign exercising the right of eminent domain, an essential attribute of sovereignty. *Kohl* v. *United States,* 91 U. S. 367, 371, 372. Its action in doing so gives rise to no implication that it consented to anything other than that just compensation be determined. The condemnation proceeding thus affords no basis for an implication that the Government has "laid aside its protective cloak of immunity from suit" (R. 227).

C. PETITIONER COULD NOT RECOVER INTEREST ON THE CONTRACT

Even if the district court had jurisdiction to adjudicate petitioner's counterclaim based on the contract, he would not be entitled to recover interest. It is well settled that the United States is not liable for interest on a contract claim unless either the contract itself or a statute shows a contrary intention. *Smyth* v. *United States,* 302 U. S. 329, 353; *United States ex rel. Angarica* v. *Bayard,* 127 U. S. 251; *United States* v. *North Carolina,* 136 U. S. 211; *United States* v. *North American Co.,* 253 U. S. 330, 336; *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 304. Neither is the case here.

II

THE UNITED STATES HAS NOT AS YET TAKEN A FLOWAGE EASEMENT OVER PETITIONER'S PROPERTY

Both the district court and the court of appeals denied petitioner recovery on the contract but the court of appeals in its first opinion (R. 228–229) held that a taking had occurred on October 21, 1929, and awarded interest from that date as a part of just compensation. The Government obtained a rehearing (R. 230–233) and, in its second opinion (R. 233–239), the court held that there has as yet been no taking of a flowage easement over petitioner's land. This holding, we submit, is entirely correct.

In view of the petitioner's contentions (Br. 22), and since the factual situation changed from time to time, the Government's argument can best be presented by a chronological discussion centering on each of the possibly significant dates.[8]

A. THERE WAS NO TAKING ON THE DATE WHEN THE WORK BEGAN

On October 21, 1929, the Government began construction of the set-back levee (R. 195). This was the first work done on the proposed floodway proj-

[8] The petitioner asserts (Br. 22), but without conviction (Br. 40), that when the Flood Control Act which adopted the Jadwin Plan became law on May 15, 1928, it constituted a taking of a flowage easement over his land. However, the mere adoption of a plan obviously does not constitute a taking. *Willink* v. *United States*, 240 U. S. 572; *Bauman* v. *Ross*, 167 U. S. 548. See Brief for petitioner in *United States* v. *Sponenbarger*, No. 72, this Term, pp. 33–38.

ect. There is nothing in the record to indicate what was actually done on that date. However, the existing riverside levee had not been altered and thus it afforded to the petitioner's land the same protection it had formerly enjoyed (R. 110–111).

1. *Nothing had been done at that time to increase the possibility of overflow.*—Since 1914 the riverside levee between Birds Point and New Madrid had been maintained at a height of approximately 58 feet on the Cairo gauge (R. 189–190). That part of the Jadwin Plan which relates to this floodway contemplates the reduction of an eleven-mile portion of this levee, known as the upper fuse-plug section, to a height of 55 feet.* H. Doc. 90, 70th Cong., 1st sess., p. 29 (1927). Only after this is done will the possibility of overflow of lands within this floodway be increased, since the reduced levee will admit waters to the floodway when the Mississippi is at a 55-foot stage instead of affording protection up to 58 feet, as the existing riverside levee does.

On October 21, 1929, the upper fuse-plug section had not been reduced and the riverside levee had not been altered in any way (R. 111). Thus it is clear that nothing had been done at that time to increase the frequency with which petitioner's land might be flooded.

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* The levee for about one mile in the middle of this eleven-mile stretch will be retained at the 58-foot level (R. 190).

Furthermore the Flood Control Act expressly prohibited any act at that time which would have subjected petitioner's land to more frequent overflow. Section 1 provides—

> That pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway, but nothing herein shall prevent, postpone, delay, or in anywise interfere with the execution of that part of the project on the east side of the river, including raising, strengthening, and enlarging the levees on the east side of the river.

The flood protection which the Danforth tract enjoyed was afforded by the levee on the west side of the river; the Act required that the land continue to have this protection until the floodway was completed. A holding that a taking had occured on October 21, 1929, the day the very first work was done, would therefore be wholly inconsistent with the clear mandate of the Flood Control Act.

2. *Nothing had been done to increase the depth, duration, or velocity of overflow.*—There was testimony to the effect that the completed set-back levee would increase the depth, duration, and velocity of overflow by confining to the floodway water which would otherwise have passed to the west (R. 190–191). It will subsequently be shown

that no taking can be predicated solely upon the confining effects of the completed set-back levee (*infra*, pp. 33–36). At this time it is sufficient to point out that the result of the first day's work could not have confined any floodwaters which might have overtopped the unreduced riverside levee.

3. *The petitioner has not been deprived of his right to protect his land against floods.*—The petitioner contends that he was deprived of his right to raise and improve the riverside levee (Br. 22–24, 37–38). But there is no showing in the record that the United States has taken title to the riverside levee, or that it has prevented the landowners from raising that levee to protect their land. As a matter of fact, title to the riverside levee remains in the levee district which owned it before the Flood Control Act was adopted, and the United States has not taken any step to prevent the landowners from raising the levee if they see fit.

The Flood Control Act neither specifically nor by implication deprives the landowners of the right to raise the riverside levee, at least up to the time when the fuse-plug section is reduced to fifty-five feet. The Jadwin Report had urged (par. 120) that the United States be given such control. The Flood Control Bill as introduced (S. 3740, 70th Cong., 1st sess.) provided in section 9 that no levee or other structure could be built or altered unless approved by the Chief of Engineers and authorized by the Secretary of War. When

the bill was being considered on the floor of the House of Representatives these provisions of section 9 were stricken (69 Cong. Rec. 7114–7115).

The provisions of section 14 of the Act of March 3, 1899 (c. 425, 30 Stat. 1152; 33 U. S. C. sec. 408), which forbid interference with levees and other structures and which are made applicable by section 9 of the 1928 Act, apply only to levees and other structures *built by* the United States, and consequently have no application to this levee, which was built by local interests. The restoration of the portions of the riverside levee unlawfully dynamited during the 1937 flood (see pp. 40–42, *infra*) obviously did not transform the entire levee, as petitioner contends (Br. 27), or even the dynamited portions into a levee "built by the United States" within the meaning of the 1899 Act.

It may reasonably be inferred that after the fuse-plug section is reduced to the 55-foot level the landowners will not have the right to raise it.[10] But the loss of that right is one of the very things for which the appellant will receive compensation in this proceeding. As yet no reduction has been made and

[10] The flowage rights have been purchased or condemned on the basis of a levee cut down to the 55-foot level. The Government, when they have all been acquired, will have a property right against each piece of land to maintain the levee at that reduced level. An attempt on the part of the landowners to rebuild the levee could, therefore, then be enjoined or made nugatory by a subsequent removal of the earth.

none will be made until after the payment of the judgment.

Furthermore, even if it could be said that the Government has now deprived the petitioner of his right to improve and raise the levee, this would not constitute a taking. In *Matthews* v. *United States*, 87 C. Cls. 662 (1938), the Court of Claims, with reference to such a claim in this very floodway, stated (p. 718):

> The United States had the right, without liability, in the exercise of its lawful authority to control navigation and navigable waters, to fix the height at which the riverside levee might be constructed—namely, at 58 feet, and plaintiff cannot sustain a taking because of this feature of the Flood Control Act nor from the fact, if it were a fact, that the United States will not maintain or assist in maintaining the riverside levee at its present height of 58 feet.

The same holding is implicit in the decisions of this Court in *Jackson* v. *United States*, 230 U. S. 1; and *Hughes* v. *United States*, 230 U. S. 24. See Brief for Petitioner in *United States* v. *Sponenbarger*, pp. 41–42.

4. *The cases relied upon by petitioner are not in point.*—The petitioner places considerable reliance on *Hurley* v. *Kincaid*, 285 U. S. 95 (Br. 24, 34–35). There Kincaid sought to enjoin work on the Boeuf Floodway, contending that since his land, which was located in the proposed floodway, had not been condemned, the construction of the

floodway would deprive him of his property without just compensation. The Court stated (p. 103):

> We have no occasion to determine any of the controverted issues of fact or any of the provisions of substantive law which have been argued * * *. *We may assume that, as charged,* the mere adoption by Congress of a plan of flood control which involves an intentional, additional, occasional flooding of complainant's land constitutes a taking of it—as soon as the Government begins to carry out the project authorized. [Italics supplied.]

Clearly, Mr. Justice Brandeis was resorting to the familiar practice of assuming the postulates most favorable to the party seeking relief for the purpose of showing that even under such assumptions he was not entitled to it.[11]

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[11] Petitioner also relies (Br. 34–35) upon the decision of the lower courts in the *Kincaid* case, although reversed by this Court. The *per curiam* opinion of the Fifth Circuit (49 F. 2d 768) simply adopts the opinion of the district court (37 F. 2d 602). Petitioner sets out (Br. 35) a portion of that opinion to the effect that the appropriation of flowage rights begins with the construction of the first levee works which are intended to direct the water upon the land. But the court indicated that that appropriation only *begins* with the commencing of construction and said (p. 608):

"When they [the levee works] will have been completed, the appropriation will be complete."

Since an incomplete taking is no taking, the opinion of the district court, if authority for anything, is authority that there can be no taking prior to completion of the work which injures the landowner.

Petitioner cites *Jacobs* v. *United States*, 290 U. S. 13; *United States* v. *Cress*, 243 U. S. 316; *United States* v. *Lynah*, 188 U. S. 445; *Pumpelly* v. *Green Bay Company*, 13 Wall. 166; *United States* v. *Chicago, B. & Q. R. Co.*, 82 F. 2d 131 (C. C. A. 8); and *United States* v. *Chicago, B. & Q. R. Co.*, 90 F. 2d 161 (C. C. A. 7), but his own statement of those cases (Br. 27–32, 38–39) shows that they are not in point. Each involved a flooding and physical invasion of property, which cannot possibly occur in the case at bar until after the fuse-plug section is reduced. The apprehension of a future taking does not, of course, warrant the recovery of compensation. *Peabody* v. *United States*, 231 U. S. 530; *Matthews* v. *United States*, 87 C. Cls. 662; *Kirk* v. *Good*, 13 F. Supp. 1020, 1021 (E. D. Mo.).

5. *The implications of petitioner's position.*—A holding that a taking occurred on October 21, 1929, would mean that the Government became liable for interest on the day when the first spadeful of earth was turned. Moreover, while the date of taking is important, as fixing the period for which interest must be paid, it is possibly even more important as determining the time when the Government might irrevocably become bound to make just compensation. A holding that a taking occurred on October 21, 1929, would certainly lend support to a contention that the Government became liable on that date to make compensation for flowage ease-

ments over lands in the floodway. If that is so, even if the Government had not instituted condemnation proceedings, compensation could have been recovered in an action against it under the Tucker Act on an implied contract. *Hurley* v. *Kincaid*, 285 U. S. 95. This liability would greatly embarrass the construction of a national flood control system since it frequently becomes necessary to modify a proposed floodway project in the light of further experience. See Supplemental Brief for petitioner in *United States* v. *Sponenbarger*, No. 72, this Term. If, for example, after commencing construction on the Birds Point-New Madrid floodway project the Government had shifted the line of the set-back levee (as it could have done without any amendment of the act), so that the petitioner's land would not be included in the floodway, the Government would nevertheless under petitioner's theory be liable to compensate him for a flowage easement, even though his land would no longer be in the floodway. This cannot be the law: the absurdity of such a result points strongly to the conclusion that no taking occurred on October 21, 1929.

B. THERE WAS NO TAKING ON THE DATE THE SET-BACK LEVEE WAS VIRTUALLY COMPLETED

It has been shown that on October 21, 1929, when construction was begun on the set-back levee, nothing had been done which constituted a taking. On October 31, 1932, the set-back levee was 98.9%

completed; only the gap where the Missouri Pacific Railroad crossed near Samos had not been closed (R. 195). The record does not show the progress of the work between these two dates, but this is immaterial since, as will be shown, no taking had occurred even on the later date.

1. *Nothing had been done to increase the possibility of the overflow.*—So far as the possibility of overflow is concerned, the situation on October 31, 1932, was identical with that on October 21, 1929 (see pp. 23–24, *supra*). The upper fuse-plug section, which was designed to divert water to the floodway when the river reached a 55-foot stage, had not been reduced, the riverside levee had not been altered (R. 111), and it is clear from the record that the existence of the set-back levee would not affect the frequency of flooding (R. 190).

It has been shown, furthermore (p. 24, *supra*), that under section 1 of the Flood Control Act nothing could be done which would subject petitioner's land to more frequent overflow until the floodway was *completed*. On October 31, 1932, it had not been completed. Although mathematically 98.9% of the work on the set-back levee had been done, the completion of physical construction is not the only element prerequisite to the completion of the floodway. Section 4 of the Flood Control Act provides that the United States shall acquire flowage rights for additional destructive waters which will pass by reason of diversions from the main channel of the Mississippi River.

The only reasonable interpretation that can be placed on the proviso in section 1, read together with section 4,[12] is that flood protection cannot be

[12] After the bill (S. 3740) which became the Flood Control Act had undergone lengthy debate in the House of Representatives, Congressman Reid, Chairman of the Flood Control Committee of the House of Representatives, then stated with reference to section 4, as it then stood, that he would not support a bill which would permit the flooding of the floodways "*without first acquiring* the right-of-way or the flowage rights" (69 Cong. Rec. 7000).

The next day he proposed the following amendment to section 4:

"The United States shall provide flowage rights for destructive flood waters that will pass by reason of diversion from the main channel of the Mississippi River and shall control, confine, and regulate such diversion" (*id.* p. 7104). The first part of this amendment differs from the provisions of section 4 of the Act in that it does not contain the word "additional."

Majority Leader Tilson opposed this proposed amendment because he understood it to mean that "we shall simply buy the flowage rights *in advance*" (*id.* p. 7105). Congressman Reid said that he would insist on the amendment because he was opposed to giving the landowners only a law suit (*id.* 7105), and stated (*id.* 7106) that he understood the amendment to mean that "no water shall be turned from the main channel of the Mississippi River *until* the United States acquires the flowage rights." Thus both sides understood that this amendment to section 4 would require the acquisition of flowage rights in advance. [Italics supplied throughout.]

Congressman Tilson in opposing this amendment offered his own (*id.* 7104) which read as follows: "Any property taken by the United States for the purpose of carrying out the terms of this Act for which compensation is required by the Constitution of the United States shall be paid for by the United States." This provision had been passed upon by the Attorney General (*id.* 7108) and represented the

lessened until both construction is completed and the necessary flowage rights are acquired. This is the interpretation of section 1 adopted by the War Department (R. 198); *Matthews* v. *United States*, 87 C. Cls. 662, 680, 700 (1938).[13] It is also significant that following the 1937 flood the crevassed riverside levee was restored by the War Department to its previous height (R. 200).

2. *There is no taking because the set-back levee would confine the floodwaters.*—There was testimony that the completed set-back levee would increase the depth, duration, and velocity of overflow by confining to the floodway waters which would otherwise pass to the west (R. 190–191). It would, however, serve only to confine waters which had already overtopped the unreduced riverside levee and that would not constitute a taking, but merely consequential damage. *Hughes* v. *United States*, 230 U. S. 24; *Sanguinetti* v. *United States*, 264

Administration's viewpoint. Notwithstanding this fact, the Tilson amendment was rejected and the Reid amendment to section 4 accepted (*id.* 7111). This legislative history clearly shows that Congress intended that the flowage easements be acquired in advance.

[13] Compare the language in *Kirk* v. *Good*, 18 F. Supp. 1020, 1021 (E. D. Mo.), app. dism. upon stip., 64 F. 2d 1015 (C. C. A. 8): "The court ought not, and will not, anticipate that defendants in the future, without instituting and prosecuting a condemnation proceeding in the manner provided by law, will appropriate plaintiff's property by removing any part of the present levee along the west bank of the Mississippi River, and thereby flood plaintiff's land. *Oregon* v. *Hitchcock*, 202 U. S. 60, 26 S. Ct. 568, 50 L. Ed. 935."

U. S. 146; *Jackson* v. *United States*, 230 U. S. 1; *Bedford* v. *United States*, 192 U. S. 217; *Gibson* v. *United States*, 166 U. S. 269; *Christman* v. *United States*, 74 F. 2d 112 (C. C. A. 7); *Kirk* v. *Good*, 13 F. Supp. 1020 (E. D. Mo.), appeal dismissed upon stipulation, 64 F. 2d 1015 (C. C. A. 8). Thus, in the *Matthews* case, the court said (p. 719):

> *The construction by the United States of a second or set-back levee, so as to confine any floodwaters in a specified area, was not alone a taking of any property or property rights.* The construction of such levee was clearly in the exercise of a lawful power and any increased costs to plaintiff in the operations of a business or in the exploitation of his timber, or any depreciation in the value of his property because of such anticipated increased costs of carrying on operations over the set-back levee are consequential damages for which no recovery can be had under the Fifth Amendment. [Italics supplied.]

The Constitution, therefore, would impose no liability on the Government.

Nor would section 4 of the Flood Control Act apply before reduction in height of the riverside levee. It requires the United States to provide flowage easements only "for additional destructive floodwaters that will pass by reason of diversions from the main channel of the Mississippi River." The Act, which in any event is simply a direction to Government officers, thus contemplates the ac-

quisition of flowage easements only for additional waters which the floodway projects will *divert* into the floodway from the river. See Brief for Petitioner in *United States* v. *Sponenbarger*, No. 72, this Term, pp. 62–76. The Birds Point-New Madrid project will not divert additional water from the river until the fuse-plug section has been reduced below 58 feet. This is the interpretation placed upon section 4 of the Act by the Court of Claims. It said in the *Matthews* case (p. 705):

> It is only floods between 55 and 58 feet on the Cairo gauge that will be diverted "from the main channel of the Mississippi River," and this "diversion" will be due to the reduction in such protection as existed at the time of institution of this suit at 58 feet and establishing the same at 55 feet on the Cairo gauge.

One of the petitioner's witnesses estimated that the combining effect of the completed set-back levee would have increased the depth of the 1913 flood on the petitioner's land by three to four feet and of the 1937 flood by five to six feet. The witness also said the duration and velocity of the overflow would be increased, but did not estimate the extent of such increase. He further testified, in general terms, that increases in depth and velocity would result in increased damage to buildings, but did not state how much of an increase in damage there would be (R. 190–192). There is no other evidence in the record as to the effect of the set-back levee alone.

It is plainly insufficient to show that there has now been a taking because of construction of the set-back levee.[14]

3. *The Sponenbarger and Matthews Cases.* The reasoning of the majority of the court below in *Sponenbarger* v. *United States*, 101 F. 2d 506, certiorari granted, No. 72, this Term, is not easy to reconcile with that of the same court (with different judges sitting) in this case. As pointed out in our brief in opposition (pp. 11–12) the cases are not in necessary conflict because of the factual assumptions made in the *Sponenbarger* opinion. But in that case the majority of the court held, *inter alia:* (1) the Boeuf floodway (although abandoned by Act of Congress), must be held to be in operative condition because the Jadwin Plan as a whole was about 90 percent complete; (2) Federal control over the fuse-plug levees had been asserted,

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[14] We need not rely on the fact that when the case was tried below, the set-back levee was only 98.9 percent completed. But it may be noted that there was then a gap in the set-back levee where the railroad went through to Samos (R. 195). The railroad embankment extended from this gap southeastward to Crosno. Headwaters from the north would be retained by the embankment (R. 192) and would obviously pass out of this gap. The force of the water passing through the gap would be likely rapidly to enlarge the opening by tearing away the exposed sides of the set-back levee. (Compare the origin and operation of Natural Crevasse No. 4 (R. 192) and see *Matthews* opinion, pp. 703 and 717; 2 Elliott, The Improvement of the Lower Mississippi for Flood Control and Navigation (1932), pp. 197–201.) This would largely reduce the confining effect of the set-back levee as it existed on October 31, 1932.

apparently because it was so recommended in the Jadwin Report. The court reached contrary conclusions on these points in this case. For statistical purposes, it may be noted that in the Eighth Circuit three circuit judges and two district judges (one sitting as a circuit judge) agree with the Government; two circuit judges differ.

Apart from these factors, the *Sponenbarger* decision seems to have turned largely upon the court's view—contradicted both by the unreversed findings of fact by the district court and by the facts of judicial notice—that the certainty and violence of flooding had been increased by virtue of what the court viewed as an "operative" fuse-plug. The equivalent situation in the case at bar will not arise until the fuse-plug section can be and is reduced, in accordance with the provisions of the Act.[15]

The Government's contention that there was no taking on October 31, 1932, finds complete support in the decision of the Court of Claims in *Matthews*

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[15] *United States* v. *Yazoo & M. V. R. Co.*, 4 F. Supp. 366 (E. D. La.), reversed and remanded by the circuit court of appeals *per curiam*, upon stipulation, 67 F. 2d 1019 (C. C. A. 5), which is relied upon by the petitioner (Br. 24) is not in point because (1) the court erroneously held that the order of immediate possession obtained pursuant to 33 U. S. C. sec. 594 vested title in the United States, (2) the Bonnet Carre project was a controlled spillway (H. Doc. 90, 70th Cong., 1st sess. (1927), p. 7) and not a fuse-plug project, and (3) the spillway was on the east bank and therefore expressly excluded from the restrictive proviso in section 1 of the Flood Control Act (see p. 45, *infra*).

v. *United States*, 87 C. Cls. 662. The facts in that case and in the case at bar are almost identical. Matthews filed suit in the Court of Claims to recover just compensation for an alleged taking of flowage rights over land situated in the Birds Point-New Madrid Floodway (p. 663).[16] The northern boundary of the Matthews property is a little more than a mile south of the southern line of the parcel involved in this proceeding. At the time of the Matthews suit the set-back levee had been completed except for the closing of the gap where the right-of-way of the Missouri Pacific Railway intercepts and passes through the levee (p. 684). The court held that the construction of the set-back levee so as to confine floodwaters did not constitute a taking of land in the floodway (pp. 715, 719) and that the provision for the reduction of the riverside levee at some future time was not a taking (p. 715).

The petitioner seeks to distinguish the *Matthews* decision (Br. 33–34) on the ground that the greater part of the land involved in that case was in the backwater area [17] while in this case the greater part

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[16] Subsequent to filing of the suit in the Court of Claims the Government instituted proceedings to condemn a flowage easement over the Matthews tract (p. 666), but these proceedings were stayed because of the litigation in the Court of Claims and have recently been dismissed on motion of the Government (Law No. 706, E. D. Mo., S. E. Div.).

[17] When the river attains a stage of 55 feet on the Cairo gauge, floodwater backs up from the south and overflows lands which have an elevation of 300 feet Mean Gulf Level or less (R. 111).

is above backwater. This was not the basis of the decision of the Court of Claims,[18] nor could it have been since 245 acres of the Matthews land were above backwater.

4. *The implications of petitioner's position.*— The enormous scope and necessarily great cost of the Government's flood control program is well known. If this Court were to hold that a taking occurred on October 31, 1932, or prior thereto, the Government would seem to be liable for interest on all future awards for flowage rights in the proposed floodways without regard to the fact that years might elapse before anything was done to increase the flood hazard. Although, except for this case, flowage rights have been acquired throughout the Birds Point floodway,[19] this is not the case in the Morganza, the west Atchafalaya, and the proposed Eudora floodways.[20] The application of the principle urged by petitioner might result in adding millions of dollars to the cost of the flood control program.

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[18] The situation in the two cases is the same, in any event, for even if there had been no floodway both tracts would have been flooded, one by backwater, the other by headwater. As pointed out in *United States* v. *Cress*, 243 U. S. 316, 328, there is no difference in kind.

[19] See 1938 Annual Report of Chief of Engineers, p. 2086, and footnote 16, *supra*, p. 38.

[20] See Supplemental Brief for petitioner in *United States* v. *Sponenbarger*, No. 72, this Term, pp. 18–20.

C. THE ACTS OF ARMY OFFICERS DURING THE 1937 FLOOD EMERGENCY

Between October 31, 1932, and April 23, 1937, when judgment was entered, there was no change in the factual situation except for a brief interval in January of 1937 when a flood occurred which was unprecedented in the history of the Mississippi River in this stretch (R. 191). It is difficult to tell whether petitioner contends that certain acts of army officers at that time constituted a taking (Br. 16, cf. 27) or merely indicated that the Government believed that it had the right to place the floodway in operation (Br. 27; see opinion below, R. 238).

As the flood approached its crest Colonel Reybold, the officer in charge of Engineer District No. 1 at Memphis, directed Major Burdick to proceed to the area and place the Birds Point-New Madrid Floodway in operation (R. 196–199). These orders were issued by him upon his own initiative, since he had received no instructions from any of his superiors (R. 200). The orders, however wise or necessary in view of the danger to Cairo, and their execution by his subordinate, were, as the court of appeals held (R. 238), in violation of the mandate of Congress: the dynamiting of three portions of the upper fuse-plug reduced the flood protection afforded by the levee on the west side of the river, and this was prohibited by section 1 of the Flood Control Act since the floodway had

not been completed.[21] After the flood subsided the Chief of Engineers recognized, in effect, that the artificial crevassing of the riderside levee had been done without authority when he issued instructions to Colonel Reybold to restore the levee to its previous height (R. 200).

It is clear that no taking can be predicated upon these unauthorized acts of Government officers. *Hooe* v. *United States*, 218 U. S. 322; *Hughes* v. *United States*, 230 U. S. 24. In the latter case the Supreme Court held that if the act of an officer of the United States in dynamiting a levee in an emergency was wrongful, it was not the act of the United States and did not amount to a taking of the property overflowed as a result of the dynamiting.

Since the acts of the army officers were unauthorized and a violation of the Flood Control Act they are plainly not indicative, as petitioner suggests, that the Government believed that it had the right to place the floodway in operation. It is evident that the Government took the contrary view because the dynamited portions of the levee were restored to their previous height (R. 200). Furthermore, little importance can be attached to those acts since as the court of appeals recognized (R.

[21] It has been shown (pp. 31–33, *supra*), that the Flood Control Act prohibited the reduction of the riverside levee on October 31, 1932, because construction work had not been completed and the necessary flowage easements had not been obtained. The situation at the time of the dynamiting in January of 1937 was exactly the same.

238) "they were done in the midst of the pressing emergency and at a time when the appellant's land was subject to an inevitable overflow."

It is clear from the record, moreover, that the project did not cause the overflow of petitioner's property. Prior to 1937 all major floods had inundated his land and the 1937 flood was the greatest in history (R. 112, 191). It is undisputed that even with extraordinary high water maintenance the 1937 flood would have overtopped the riverside levee and overflowed the Danforth land (R. 190–191, 193). The landowner's expert witness testified that water from Natural Crevasse No. 1 was the first to enter the floodway (R. 192). It was also the first to overflow the petitioner's land since the southward flow from the artificial crevasses was retarded by O'Bryan's Ridge and the railroad embankment (R. 193). The same witness also stated that the volume of flow from the natural crevasses exceeded that from the artificial crevasses (R. 193). Since the petitioner's land would have been overflowed during the 1937 flood regardless of the project, clearly no taking occurred at that time.

D. THE ENTRY OF JUDGMENT

There was, therefore, no taking before the entry of judgment. The entry of judgment did not constitute a taking. *Barnidge* v. *United States*, 101 F. 2d 295, 298 (C. C. A. 8); *Kanakanui* v. *United States*, 244 Fed. 923 (C. C. A. 9); *Johnson &*

Wimsatt v. *Reichelderfer*, 66 F. 2d 217 (App. D. C.); *Miller* v. *United States*, 57 F. 2d 424 (App. D. C.); *District of Columbia* v. *Hess*, 35 App. D. C. 38. Since the fuse-plug section cannot be reduced until the necessary flowage easements are acquired, no taking will occur until the judgment is paid.

CONCLUSION

Since the district court did not have jurisdiction to adjudicate petitioner's contract claim and since there has as yet been no taking of a flowage easement over petitioner's land, it is respectfully submitted that the judgment of the circuit court of appeals should be affirmed.

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OCTOBER 1939.

APPENDIX

ACT OF MARCH 3, 1797, C. 20, 1 STAT. 514; R. S. SEC. 951, AS AMENDED (28 U. S. C. SEC. 774)

In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the General Accounting Office for its examination, and to have been by it disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the General Accounting Office by absence from the United States or by some unavoidable accident.

THE MISSISSIPPI RIVER FLOOD CONTROL ACT

(ACT OF MAY 15, 1928, C. 569, 45 STAT. 534; 33 U. S. C. SECS. 702A–702M)

AN ACT For the control of floods on the Mississippi River and its tributaries, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers

to the Secretary of War dated December 1, 1927, and printed in House Document Numbered 90, Seventieth Congress, first session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: * * * *Provided,* That all diversion works and outlets constructed under the provisions of this Act shall be built in a manner and of a character which will fully and amply protect the adjacent lands: *Provided further,* That pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway, but nothing herein shall prevent, postpone, delay, or in anywise interfere with the execution of that part of the project on the east side of the river, including raising, strengthening, and enlarging the levees on the east side of the river. The sum of $325,000,000 is hereby authorized to be appropriated for this purpose.

All unexpended balances of appropriations heretofore made for prosecuting work of flood control on the Mississippi River in accordance with the provisions of the Flood Control Acts approved March 1, 1917, and March 4, 1923, are hereby made available for expenditure under the provisions of this Act except section 13.

* * * * * *

SEC. 3. Except when authorized by the Secretary of War upon the recommendation of the Chief of Engineers, no money appropriated under authority of this Act shall be expended on the

construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of War that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4; (c) provide without cost to the United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or floodwaters at any place: *Provided, however,* That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river, it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

SEC. 4. The United States shall provide flowage rights for additional destructive floodwaters that will pass by reason of diversions from the main channel of the Mississippi River: *Provided,* That in all cases where the execution of the flood-control plan herein adopted results in benefits to property, such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid.

The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States district court for the district in which the land, easement, or right-of-way is located. In all such proceedings the court, for the purpose of ascertaining the value of the property and assessing the compensation to be paid, shall appoint three commissioners, whose award, when confirmed by the court, shall be final. When the owner of any land, easement, or right-of-way shall fix a price for the same which, in the opinion of the Secretary of War, is reasonable, he may purchase the same at such price; and the Secretary of War is also authorized to accept donations of lands, easements, and rights-of-way required for this project. The provisions of sections 5 and 6 of the River and Harbor Act of July 18, 1918, are hereby made applicable to the acquisition of lands, easements, or rights-of-way needed for works of flood control: *Provided,* That any land acquired under the provisions of this section shall be turned over

without cost to the ownership of States or local interests.

* * * * *

SEC. 9. The provisions of sections 13, 14, 16, and 17 of the River and Harbor Act of March 3, 1899, are hereby made applicable to all lands, waters, easements, and other property and rights acquired or constructed under the provisions of this Act.

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SEC. 12. All laws or parts of laws inconsistent with the above are hereby repealed.

* * * * *

Approved, May 15, 1928.

U. S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES.

No. 309.—October Term, 1939.

William H. Danforth, Petitioner,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 4, 1939.]

Mr. Justice Reed delivered the opinion of the Court.

A writ of certiorari was granted[1] to review the judgment of the Court of Appeals for the Eighth Circuit[2] affirming a judgment of the District Court for the Eastern District of Missouri which awarded to a property owner, against the United States, compensation in condemnation less in amount than a sum fixed by an arrangement between the parties prior to the institution of the condemnation. This judgment provided for payment of the award into the registry of the court and that upon such payment the United States should be entitled to the relief sought. Although the issue was raised by the landowner, no provision was made as to interest. The writ was granted to determine important questions of federal law as to the effect in condemnation, of prior agreements by the United States as to the amount of awards and as to the running of interest.

This proceeding arose in the course of carrying out the protection from destructive floods of the alluvial valley of the Mississippi between Cape Girardeau, Missouri, and Head of Passes, Louisiana. This work of internal improvement was begun under the Flood Control Act of May 15, 1928.[3] The passage of this act followed the disastrous experience with the flood of 1927 and was based upon a comprehensive report and plan known as the Jadwin Plan, Major General Edgar Jadwin, then Chief of Engineers of the United States Army, being in charge of its development.[4] The plan covers the great alluvial valley of the Mississippi through its entire length from the Ohio to the delta. In essence, the plan in its entirety is based upon a levee system which constricts the water to a moderate

[1] 308 U. S. —.

[2] 102 F. (2d) 5, 105 F. (2d) 318.

[3] 45 Stat. 534, 33 U. S. C. § 702a-702m.

[4] The plan is found in "Flood Control in the Mississippi Valley," H. R. Doc. No. 90, 70th Cong., 1st Sess. Reference is also made in the Flood Control Act to a plan recommended by the Mississippi River Commission and authority is granted to adjust the engineering differences between the two plans.

degree and allows in periods of extreme floods the escape from some lower levees, known as fuse-plugs, of the water from the main channel to back waters and floodways.

The particular portion of the plan involved here is known as the Birds Point-New Madrid Floodway. Prior to the passage of the Flood Control Act, there were levees along the west bank of the Mississippi between Birds Point, Missouri, and New Madrid, Missouri, which substantially followed the meanderings of the river. To get a greater area for the spreading of flood waters, the plan provided for a second levee to be set back about five miles from the riverbank levee running from Birds Point to St. Johns Bayou, just east of New Madrid. Near its upstream connection with the set-back levee the present riverbank levee would be lowered some five feet by what is called a fuse-plug, so that at high flood the water will begin to flow into the wide floodway below. It is expected that this enlarged channel will keep anticipated floods from rising above the levees protecting Cairo, Illinois. The set-back levee will confine its diverted water to the floodway area between the set-back levee and the riverside levee and will return the water to the Mississippi through a lower fuse-plug section where a gap is left in the levee system to permit complete drainage. The land involved in this condemnation is situated in this floodway immediately east of the set-back levee and about midway between Birds Point and New Madrid.

The Flood Control Act stipulates that the United States "shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River." The same section authorizes the Secretary of War to "cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which . . . are needed in carrying out this project. . . ." Jurisdiction of the proceeding is given to the United States district court for the district in which the property is located. Commissioners were authorized to view and value. It was further provided: "When the owner of any land, easement, or right of way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price; . . ."[5]

There is the additional provision in Section 1 of this same Act that "pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree

[5] 45 Stat. 534, c. 569, sec. 4.

of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway."

Construction work began on the set-back levee on October 21, 1929, and was substantially complete on October 31, 1932. The riverside levee is maintained at its original height of about 58 feet and the upper fuse-plug, which is designed to admit water into the floodway, has not yet been created.

In January, 1937, the Mississippi River attained its highest flood stage in recorded history. Late in that month the United States Army officer in charge of Memphis Engineers, District No. 1, directed a subordinate to proceed to the area and place the Birds Point-New Madrid Floodway in operation. These instructions were issued by the officer in charge of the district without orders from any superior. The directions were carried out after flood waters were trickling over the riverside levee into the floodway area through a natural crevasse and when pursuant to these orders an artificial crevasse was created by dynamiting the northern portion of the upper fuse-plug section. Later another artificial crevasse was created and other natural crevasses developed. Through these crevasses petitioner's land was flooded. As the river would have reached a stage sufficiently high to overtop the riverside levee, even with extraordinary high-water maintenance, the land of the petitioner would have been flooded without the crevassing. The set-back levee did confine the diverted water to the floodway. It increased its depth and destructiveness on petitioner's land. After the flood subsided, the riverside levee, including the upper fuse-plug section, was restored to its previous height.

Prior to the institution of this action, orders had been issued by the Secretary of War, under the provisions of Section 4 of the Flood Control Act, to purchase this tract of land. A letter containing the offer for the flowage rights here involved, dated January 14, 1932, had been received by the petitioner and the offer accepted by him within an agreed extension of the limited time. The letter, so far as pertinent, reads as follows:

"2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and 98/100—Dollars ($31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, over your land designated as Tract No. 243, as indicated on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

"3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed

verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses."

After its acceptance, there was an attempted withdrawal of this offer by a letter of July 8, 1932, which advised the owner that "after a careful review of the question of flowage over these tracts it was found by higher authority that the prices first suggested could not be properly recommended to the Court."

After this letter, a petition was filed by the United States to condemn over the land here in question a perpetual right, power easement, and privilege to overflow, as contemplated by said project and described in House Document 90. After the appointment and report of the commissioners for the determination of an award, petitioner filed an answer and counterclaim. In the answer he set up that prior to the filing of the suit a "written offer of settlement for the damages and for the purchase of an easement" for floodway purposes was made by the United States and accepted by petitioner. Petitioner further alleged an offer of title to the easement sought and a request for the payment of the agreed sum. Judgment against the United States was asked in that amount, "with interest," to be paid into court for the benefit of the defendants, in accordance with their respective rights and against the defendants for the perpetual flowage easements "upon payment into Court" of the agreed sum. Changing the designation of the pleading from answer to counterclaim, these allegations were repeated as a counterclaim. The Court sustained a motion of the United States to strike this answer and counterclaim on the ground that the petitioner had waived his rights under the written agreement because of his failure to plead them prior to the entry of the interlocutory order allowing the condemnation and appointing commissioners. Subsequently the reports of the first and second commissions appointed to view the property were set aside for reasons which are immaterial here. To the report of the third commission, awarding $17,921.70, the petitioner renewed the objection that the agreement between the United States and him was decisive in fixing the award at $31,681.98; asked for interest "from such time as the Court may find that plaintiff [the United States] appropriated the flowage easement in question" and sought new viewers to determine the award as claimed by petitioners or in the alternative that the Court enter judgment for the sum claimed with appropriate terms to create the flowage easement in the United States.

Upon this exception a hearing was had and findings and judgment entered confirming this report and adjudging the condemnor the easement sought upon payment of the award. Nothing appeared in the order as to interest. By assignments of error on appeal to the Court of Appeals and in the statement of questions involved and reasons for granting the writ of certiorari, petitioner has preserved the issues of his right to an award in the agreed amount and to interest from the date found to mark the taking from him of the land.

Determination of Value.—By answer and exception to the report of the commissioners, the petitioner pleaded the agreement on the value of the easement evidenced by the letter and acceptance referred to above. The Government contends that the "relevance of the contract . . . as a measure of the value of the easement is not in issue; the petitioner pitches his case solely on the proposition that he can enforce the contract." With this contention we do not agree. In the answer, it is true judgment is prayed against the United States for the agreed amount. But a judgment is offered to the United States for the perpetual flowage easement upon payment of the sum into court. In the objection to the commissioners' report the prayer is for entry of a judgment in the agreed sum "and upon payment of the same that the Court decree an appropriate judgment in favor of plaintiff for the said easement." We construe the accepted offer as an agreement to fix the price at the named figure for the easement sought. Paragraph 3 of the letter shows condemnation was in mind.

This action is brought under the provisions of Section 4 of the Flood Control Act. The jurisdiction of the Court to consider the landowner's contention depends upon the language of that Act, not upon the Tucker Act[6] or the general statute on condemnation.[7] We have no doubt that the authority to purchase given to the Secretary of War is sufficiently broad to authorize a purchase of petitioner's interest in land subject to perfecting the title through condemnation. The effect of such an agreement is to fix the value of the easement when the authority of the Court is invoked against a party to the agreement to acquire good title.[8] In dealing with a stipulation to waive a requirement of filing a claim for tax refund

[6] Judicial Code § 24(20), 28 U. S. C. § 41(20).

[7] 25 Stat. 357.

[8] Cf. Wachovia Bank & Trust Co. v. United States, 98 F. (2d) 609 (C. C. A. 4th).

with the Commissioner of Internal Revenue, we held such waiver enforceable in the face of a statutory requirement for such filing.[9] The convenience of preparation for trial and the interest of orderly procedure was decisive there. Here the same reasons with the supporting language as to the power of purchase leads to the conclusion that the trial court erred in striking the answer and refusing the motion to determine the value at the agreed price.[10] We need not consider the counterclaim as the answer covers the entire subject of the determination of value.

Interest.—Petitioner seeks interest on the judgment from the time of the taking or appropriation of the flowage easement. Petitioner fixes this appropriation at the time of the enactment of the Flood Control Act of May 15, 1928, on the theory that the passage of that act diminished immediately the value of this property because the plan contemplated the ultimate use of the floodway. Alternatively the date of the taking is fixed by petitioner as of October 21, 1929, when work began on the set-back levee or October 31, 1932, when the set-back levee was completed.

There is no disagreement in principle. Just compensation is value at the time of the taking. The Congress, in other situations, has adopted the time of taking as the date for determination of value.[11] For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment.[12] Unless a taking has occurred previously in actuality or by a statutory provision, which fixes the time of taking by an event such as the filing of an action,[13] we are of the view that the taking in a condemnation suit under this statute takes place upon the payment of the money award by the condemnor. No interest is due upon the award. Until taking, the condemnor may discontinue or abandon his effort.[14] The deter-

[9] Tucker *v.* Alexander, 275 U. S. 228.

[10] Cf. Judson *v.* United States, 120 Fed. 637 (C. C. A. 2d) (U. S. District Attorney's agreement to submit matter of damages to arbitration, in condemnation, in accordance with the state statute is binding).

[11] 46 Stat. 1421; 47 Stat. 722, § 305.

[12] Kindred *v.* Union Pacific R. R., 225 U. S. 582, 597; in Roberts *v.* Northern Pacific, 158 U. S. 1, 10, the precedents are collected.

[13] See various statutory means of determining the time of taking in Nichols, The Law of Eminent Domain, 1917, section 436.

[14] See Bauman *v.* Ross, 167 U. S. 548, 598, 599, where there was a statutory provision relating to condemnation for streets in the District of Columbia which made the failure of the Congress to appropriate, after six months in session, for the payment of the award of damages an event which terminated the pro-

mination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources.[15] Condemnation is a means by which the sovereign may find out what any piece of property will cost. "The owner is protected by the rule that title does not pass until compensation has been ascertained and paid. . . ."[16] A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.

In *Brown* v. *United States*[17] this Court had occasion to consider whether interest should be allowed on the value of the property from the date of summons, the day fixed by the state statute to determine compensation and damages. In that case condemnation proceeded under the federal conformity statute which directs federal courts to conform to state practice and procedure, "as near as may be."[18] Interest, it was thought, was not governed by the conformity act,[19] but should be allowed in accordance with the state law from the date of summons. This conclusion flowed from the acceptance by this Court, without question, of the day of summons as the date for the determination of value, the day of taking.[20] Here proceedings are under a Flood Control Act prescribing jurisdiction and procedure. Where the condemnation is free from statu-

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ceedings. "This provision," this Court said, "secures the owners from being compelled to part with their lands without receiving just compensation, and is within the constitutional authority of the legislature." "The Constitution does not require the damages to be actually paid at any earlier time nor is the owner of the land entitled to interest pending the proceedings."

Cf. Kanakanui v. United States, 244 Fed. 923 (C. C. A. 9th); Johnson & Wimsatt v. Reichelderfer, 66 F. (2d) 217 (App. D. C.); Barnedge v. United States, 101 F. (2d) 295, 298 (C. C. A. 8th).

[15] See Lewis, Law of Eminent Domain, 3rd Ed., section 955.

[16] Hanson & Co. v. United States, 261 U. S. 581, 587.

[17] 263 U. S. 78, 84 *et seq.*

[18] 25 Stat. 357.

[19] 263 U. S. at 87.

[20] 263 U. S. at 85-86: "In these cases, the value found was at the time of taking or vesting of title and the presumption indulged was that the valuation included the practical damage arising from the inability to sell or lease after the blight of the summons to condemn. Where the valuation is as of the date of the summons, however, no such elements can enter into it and the allowance of interest from that time is presumably made to cover injury of this kind to the land owner pending the proceedings." At p. 87: "But the disposition of federal courts should be to adopt the local rule if it is a fair one, and, as already indicated, we are not able to say that with the value fixed as of the date of summons, and the opportunity afforded promptly thereafter to take

tory direction, as here, there would be no interest before the taking.[21]

This leaves for consideration the contention that there was a taking by the enactment of the legislation, when work began on the set-back levee or when that levee was completed. The mere enactment of legislation which authorizes condemnation of property cannot be a taking. Such legislation may be repealed or modified, or appropriations may fail.[22]

For completion of the set-back levee to amount to a taking, it must result in an appropriation of the property to the uses of the Government.[23] This levee is substantially complete. The Government has condemned the land upon which the set-back is built. The tract now in litigation lies between the set-back and riverbank levees. The Government could become liable for a taking, in whole or in part, even without direct appropriation, by such construction as would put upon this land a burden, actually experienced, of caring for floods greater than it bore prior to the construction. The riverbank levee at the fuse-plug has not been lowered from its previous height. Consequently the land is as well protected from destructive floods as formerly. We cannot conclude that the retention of water from unusual floods for a somewhat longer period or its increase in depth or destructiveness by reason of the set-back levee, has the effect of taking. We agree with the Court of Appeals that this is "an incidental consequence" of the building of the set-back levee.[24] Nor can we conclude that a taking occurred through the act of the Army officers in dynamiting the levee during the emergency of the 1937 flood. It was restored to its previous height. Up until this time, the plan for a fuse-plug to permit the escape of destructive flood waters was not in effect. Indeed, the petitioner disclaims any contention that the crevassing of the levee by the Government was a taking. The taking, he urges, took place before and this use is only evidence of the control obtained by the prior taking.

Reversed in part and affirmed in part.

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possession, interest allowed from the date of the summons is not a provision making for just compensation."

[21] Shoemaker v. United States, 147 U. S. 282, 321.

[22] Willink v. United States, 240 U. S. 572; Bauman v. Ross, 167 U. S. 548, 596; United States v. Sponenbarger, this day decided.

[23] Obviously if there was not a taking at the completion of the set-back levee, there could not be a taking by the beginning of construction.

[24] Compare Bedford v. United States, 192 U. S. 217; Jackson v. United States, 230 U. S. 1; Sanguinetti v. United States, 264 U. S. 146.